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THE ARMY LAWYER



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Colonel Neinast Addresses 1975 Army JAG Conference

By: Colonel William H. Neinast, Chief, Litigation Division, OTJAG

We get questions every once and a while from the field as to whether JAGC officers, particularly those in legal assistance activities, should buy malpractice insurance. The position we have taken at the Army level is that is really an individual decision for the doctors to make in the case of medical personnel and it really doesn't appear necessary. If that's true for doctors with their high exposure-high risk activities, it's even more so for lawyers.

This doesn't mean that lawyers are not faced with the possibility of suit and liability; we have had some suits filed. One was against an Army JAGC officer for advising his client, and I'm not sure whether this was in the capacity of a military justice counsel or administrative law advice or legal assistance, not to get a civilian lawyer. Well he did get a civilian lawyer. The civilian lawyer then filed a suit against the Army for, among other things, this advice.

There was an Air Force legal assistance officer who was sued for some wrong advice on the statute of limitations. Just recently, the court dismissed that suit on the basis that there was no attorney-client relationship established under the particular facts of that case and also, because of the nature of the relation, the lawyer was covered by official immunity, which is what we use most of the time in the medical malpractice cases.

There is the possibility of lawyers being sued. I don't think it is a problem, however, that we should concern ourselves with, other than making sure we're giving the best possible legal assistance or advice.

Environmental Impact Statement Litigation

I'd like now to emphasize several areas that I think you are going to be hearing more about in

the next year. First of all, the environmental impact statement litigation. That has taken a new turn recently with some suits being filed by various groups objecting to the closing or the phasing down of military installations. It started with an Air Force base where the suit was filed alleging that the environmental impact statement or assessment prepared by the Air Force was inadequate in that it did not address the socio-economic impact. This is on what hasn't been given much, if any, thought in the past. They were alleging that you have to consider what effect transferring these activities would have on not only the local economy of the losing base, but also what it will do to the economy of the gaining base. What will it do to the tax structure? Will they have sufficient police and fire protection? Those are the type of questions. In that case, the judge did enjoin the Air Force from going through with the planned transfer of functions from the Air Force base until they have prepared a detailed impact statement to cover these issues.

We have been hit with the same type of allegation in an attempt to transfer some functions from the Lexington-Bluegrass Depot. That's still in litigation. We think that we have covered these aspects sufficiently to get us by without having the same result that the Air Force had at Richards-Gebaur.

There has also been one just filed recently in California. I have not had a chance to study that one, but it appears that the same issue is involved there. So I suggest this to you, that if you are involved in any way at your posts, camps, and stations with maintaining or preparing environmental impact statements, that you take a good look at it the next time by. See, regardless of what activity they might be planning, if there is a

The Army Lawyer

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need for covering the socio-economic aspects. If there is, has it been adequately covered?

Equal Employment Opportunities

In the area of equal employment opportunities, we received a real setback two weeks ago when the Court of Appeals for the District of Columbia in a nonmilitary case decided that a civilian employee who takes his equal employment opportunity complaint to the District Court is entitled at that time to a trial *de novo*. If this stands up on appeal, and there is already before the Supreme Court another case in which the same issue was raised, we are in for one heck of a battle, both in my office and your offices out in the field. If you have had anything to do with these equal employment opportunity cases, you know that by the time they get through the entire procedure they have already developed a massive administrative record. We have insisted all along that this is adequate and that the Court should be limited to a review of that to see if there is a basis in fact for the action and that there was no arbitrary and capricious action by those who had to make the decisions. But if we have to go into a trial *de novo* before the district court and start all over with this discovery procedure, you can see that the litigation division is going to have to grow in size tremendously and there is going to have to be a lot of assistance from you people in the field.

What can you do now? If you get into these when the administrative complaint is initially filed, work with the civilian personnel officers and the equal employment counselors at your post and make sure that they have done a thorough and complete study and that the recommendations they make are sound. If there is any possibility of discrimination, see that there is a real attempt to root it out at that time and that level.

The Privacy Act.

The Privacy Act is another area, which I think is going to produce a lot of litigation in the future. This a big question mark right now. I thought the Freedom of Information Act was going to produce a lot of litigation. That has not materialized. We have had only two suits against the Army,

both of them were flukes. In neither case had we received the request from the individual for the documents before the suit was filed. Once we found out that they wanted the information, it was made available to them and mooted the suit. If you look at the Privacy Act, however, and that section dealing with when and how litigation can be filed, and the fact that this gives a jurisdictional basis at the outset, we could be in for a rough sledding and a flurry of cases filed.

Keep in Touch

Finally, I would like to end with the annual plea of keep in touch with us in the Litigation Division. If someone at your post is being sued or

you think you might be sued, let us know immediately. In a couple of cases there was a little tardy notification. Again, I don't know whether in either of those cases, we could have helped any, but I'll offer this to you. Had you called Litigation Division before judgment, and then the case goes awry, we could at least share the blame with you. But if you don't call and it goes awry, we are going to point the finger at you and say, "Why didn't you call?" You might think you are being sued on an issue for the first time. In all likelihood, however, one of your brothers at an adjoining post is being sued or has already been sued on the same thing and we can help you in that manner.

A LOOK AT THE ENGLISH BARRISTER

*By: Captain Nathan H. Mann, JAGC, HQ, 1st Infantry
Division Forward, Europe*

The grey wigs and black gowns of the English barristers and judges are merely the most ostensible difference that I observed as I recently compared the British and American systems of law in London this past Spring. As a conferee in the American Bar Association's conference on "The English Barrister: His Practice, Skills, and Techniques," I was fascinated by the differences between the two systems, despite their common origins. The former Lord Chancellor of England, the Right Honorable Lord Hailsham, aptly compared the two systems by stating that both nations play "football," but to one who knows the game the differences are greater than the similarities.

The conference, sponsored by the ABA's Section on Litigation and the English Law Society, focused its attention on the barrister and his practice of the law. Unlike most conferences, we spent the bulk of our time observing the barristers and judges practicing their profession, not merely listening to lecturers. In those four days, I began to *feel* how the system works, and I came to appreciate immensely much that I saw and heard.

Only the first day of the conference was spent listening to speakers. Eminent British jurists and practitioners, discussed and outlined the roles of barrister and solicitor and the handling of

cases in court. The second and third days took us to the courts and the Inns of Court, where we saw the barristers at work before the bar and in their chambers. The final day was devoted to a trial demonstration and a panel of leading American and English participants discussing what had taken place over the week.

Captain Jerry G. DuTerroil and I joined some two hundred American civilian trial lawyers for the conference activities. Speaking with our American brethren about the law in the States from the civilian prospective was almost as edifying as learning about the English system. One attorney boasted about how cases in his area were getting to court in only six to nine months. When we told him that in Europe we bring Special Courts-Martial to trial within a required 45-day period, he almost fell off his bar stool. We found that many of our American civilian counter-parts had as little understanding for our military law as they did for the English legal system. Mention of some of the stricter requirements of the Manual, Code, and Military Court of Appeals seemed to truly shock a number of our brethren.

The most significant difference between the American and English systems of law is that the British profession is divided into distinct branches: the barristers and the solicitors. Ba-

sically, when the solicitor is retained by a client, he advises him and, if necessary, prepares the case for trial. The solicitor, not the client, then retains a barrister. The solicitor delivers to the barrister a brief, which contains documentary evidence, "proofs" of what witnesses will say, and a statement of the nature of the case. The solicitor must be present when the barrister speaks to the client and when the barrister is in court. The barrister is forbidden from speaking to any witness in the case, other than his client.

Several of the English barristers referred to themselves as "hired guns." By their training and practice, they are specialists in advocacy. The brief, at least theoretically, contains all the material required for conduct of the trial, and that is all that they use to prepare for the trial. Repeatedly, barristers praised the bifurcated system of barristers and solicitors, because they felt it allowed them to be objective and able to see "the forest for the trees." Only ten percent of the thirty-thousand English lawyers are barristers.

Legal London

The heart of the legal life in London is situated within a remarkably small area of the city. The geographical compactness enhances the homogeneity of the English bar, by bringing the vast majority of the bar together on a daily basis. The courts, libraries, schools, and offices of the lawyers are all within this area, known as "Legal London." We visited Middle Temple, one of the four Inns of Court, where aspiring students live and study and where practicing barristers have their chambers. The land beneath these ancient buildings has been occupied by lawyers since the Knights Templar dissolved their Order in the fourteenth century.

The Inns of Court play major roles in the lives of all barristers. To become a barrister one must be admitted to one of the four Inns, which are all roughly equivalent in size and stature. Once accepted, he or she must meet the educational requirements set by the Council of Legal Education and keep terms for three years. One need not have graduated from a University before admission to the bar, but undergraduates with a degree in law are exempted from some of the early educational requirements. "Keeping terms" re-

quires simply that the student eat dinner three times each term at his Inn. Having met these requirements, he or she will be called to the bar as a barrister. However, the new barrister must serve a year's pupillage under an established junior barrister. The pupil assists the junior in his daily work, after six months he may begin to take his own cases.

Most of our guides during the conference were pupils, and we learned a great deal from them about what it is like to be an English student and aspiring barrister. Incidentally, they were referred to as bear leaders. This was another quaint English tradition going back to the medieval days when bears in captivity would be lead about with rings in their noses!

After pupillage, the barrister must decide on chambers, either in London or some other city. All chambers in London are physically located in one of the four Inns. Although the barrister is prohibited from entering into a partnership, he does share chambers and a clerk with a dozen or so other barristers. I was amazed to find as many as three barristers sharing a single room for their office. The clerk is a powerful and important person in the chambers, since he manages the office, takes cases for a barrister, and arranges the fees. Unlike the American civilian or military law office, there are few secretaries and virtually no files. A file is secured in "red tape," and after the trial the entire file is returned to the solicitor.

The system of the Inns impacts greatly on the lives of the barristers and the profession as a whole. As can be seen, the London barrister spends much of his life studying, eating, sleeping, working and fraternizing there. There is a distinct university atmosphere pervading the Inns, and this compactness of space and living engenders much more homogeneity among the bar than in America. The size of the bar is practically limited by the requirement for chambers and the lack of land for expansion. Our visit to the Inns, as much as any part of the conference, gave me a feeling for what the practice of law as a barrister is like.

The homogeneity and tradition of the Inns naturally carries over into the courtroom. The atmosphere in court appeared to me to be dignified, yet congenial. The courts are steeped in

tradition, and all parties concerned must feel and undertake their actions with cognizance of the centuries. On our second day in court the judges wore red robes, instead of the usual black ones, because that day was a church holiday and the ecclesiastical calendar was still followed despite the fact that the Church no longer influences the courts as it once had. At least in a figurative, if not literal, sense the barristers and judges all know one another. They have been and will be working together often, and they conduct themselves accordingly.

The required roles of the barristers and judges greatly influence the unhurried, mutually inquiring approach to the cases. The English judge plays a significantly larger role in the trial than he does in an American court. The judge is always highly experienced and knowledgeable, because he cannot be appointed to the bench until he has practiced as a barrister for at least ten years. With his experience he is able to play a leading role in the course of the case. This requirement of experience and the lack of judicial elections significantly differentiates the overall caliber of American and British jurists.

There is generally no written record of the trial, and therefore the judge diligently notes the evidence presented. This slows the pace of the trial to the speed of the judge. Also, proper etiquette is for the judge, and not counsel, to make objections to improper questions by the examining barrister. It is common for the judge to break into the examination of any witness with questions or objections.

The lack of discovery in English law and the larger presence of the judge brings all sides together to discover in court the truth. Since the barrister has not talked to any witness, except his client, and since the solicitor has prepared the case, the barrister is less knowledgeable about what will happen in the courtroom. Further, the barrister has a professional responsibility to bring forth whatever evidence or law he might have on the issue, despite any adverse effect on his client's position. The result is that the barrister and judge work together to resolve the issues and discover the truth of the case in open court.

Upon Chief Justice Warren E. Burger's return from observing the English legal system in 1971, he expressed his esteem for that system and de-

sire for our emulation of that system. The consensus of our conference, as expressed by William E. Wright, Chairman of the ABA Section on Litigation, was that those laudable attributes of the English system are not readily transferable to the American milieu because of the vast differences between the two societies. In many ways the English have a better system for training a person to become a barrister. They have less than three thousand such attorneys in the entire nation, and American law schools are now producing thirty-five times that number each year. We could gain greatly by incorporating more practical training into our educational system; so that our attorneys would be better prepared for the courtroom.

The English barristers prided themselves in not being bogged down with all of the paperwork that the Americans engender with their extensive discovery processes and written submissions in court. Many of the American participants envied the more expeditious approach of oral submissions and less expensive approach of minimal discovery. Yet there was also the feeling of unease that perhaps not as complete a preparation or presentation would result. I did observe that the English trial was not entirely void of paperwork. I visited the courtroom of Mr. Justice Ackner, who had spoken to us about the procedures of court during the first day of our conference. He told us that he had been delighted to get away from his courtroom for a change of pace, since he had been presiding over one case for the last six months. This one trial, concerning the stimulating subject of rights to an onion peeler, produced so much paperwork that the spectators gallery was filled with binders, not people. The aisles and hallway were impassable because of piles of papers and documents. A large grey filing cabinet sitting in the middle of the courtroom seemed to be monitoring the trial and continuing profusion of paperwork.

The dignified, respectful atmosphere in the English courtroom is certainly admirable, but much of that feeling is the product of the centuries of tradition and the homogeneity of the British bar. Both attributes are reflections of the English society in general, and they are the antithesis of our American society. Perhaps these factors help explain why in the United States ours is more of an adversary system of law.

CLE News

1. TJAGSA Courses (Active Duty Personnel)

February 2-April 2: 80th Judge Advocate Officer Basic Course (5F-F10).

February 9-11: Fiscal Law (5F-F12).

March 8-10: National Guard Conference

March 8-19: 65th Procurement Attorneys' Course (95F-F10).

April 5-9: 24th Senior Officer Legal Orientation Course (5F-F1).

April 28-May 7: 66th Procurement Attorneys' Course (5F-F10).

May 10-12: Fiscal Law (5F-F12).

May 10-14: 6th Staff Judge Advocate Orientation Course (5F-F52).

May 17-20: 1st Civil Rights Course (5F-F24).

May 17-21: 3d Management for Military Lawyers (5F-F51).

May 24-28: 13th Federal Labor Relations Course (5F-F22).

June 6-19: Reserve Component Training JAGSO Teams

June 7-11: 26th Senior Officer Legal Orientation Course (5F-F-22).

June 21-July 2: 1st Military Justice II Course (5F-F31).

June 21-July 2: 1st Military Administrative Law Course (5F-F20).

June 28-July 2: 2d Criminal Trial Advocacy (5F-F32).

July 11-24: USA Reserve School BOAC and CGSC Procurement Law and International Law, Phase VI Resident/Nonresident Instruction (5-27-C23).

July 12-16: 25th Senior Officer Legal Orientation Course (5F-F1).

July 19-August 6: 15TH Military Judge Course (5F-F33).

2. TJAGSA Courses (Reserve Component Personnel)

March 8-19: 65th Procurement Attorneys' Course (5F-F10).

April 26-May 7: 66th Procurement Attorney's Course (5F-F10).

June 21-July 2: 1st Military Justice II Course (5F-F31).

June 21-July 2: 1st Military Administrative Law Course (5F-F20).

July 11-24: USA Reserve School BOAC and CGSC Procurement Law and International Law Phase VI Resident/Nonresident Instruction.

July 19-23: USA Reserve School BOAC and CGSC International Law Phase VI Resident/Nonresident Instruction (5-27-C23).

3. Selected Civilian Sponsored CLE Programs (This Quarter)

FEBRUARY

3-5: US Civil Service Commission CLE Program, Institute for New Government Attorneys, Washington, DC. Contact: Director of Legal Education, Legal Education Program, US Civil Service Commission, 1900 E St. NW, Room 7412, Washington, DC 20415.

5-7: ALI-ABA-Environmental Law Institute-Smithsonian Institution, Environmental Law, Fairmont Hotel, San Francisco, CA. Contact: Director for Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104.

7: Minnesota Chapter Federal Bar Association-TJAGSA-214th Judge Advocate Detachment, Fort Snelling, MN, Freedom of Information Act, Privacy Act, and Recent Developments in Military and Federal Criminal Law, Marriott Inn, 1919 E 78 St., Bloomington, MN 55420. Contact: Hon. Vernon J. Rausch, Administrative Law Judge, Rm. 688, Federal Building, Fort Snelling, Twin Cities, MN 55111.

8-11: American Academy of Judicial Education Program, Criminal Law III: Effective Assistance of Counsel, Right to Counsel, Double Jeopardy, Speedy and Public Trial, Insanity Defense and Competency to Stand Trial, Arizona State University, Tempe, AZ.

9-11: George Washington University-Federal Publications, The Practice of Equal Employment, Sheraton National, Arlington, VA. Contact: Seminar Division, Federal Publications Inc, 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

9-13: University of San Francisco School of Law-Federal Publications, Concentrated Course In Government Contracts, Williamsburg, VA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

11-14: American Academy of Judicial Education Program, Evidence III: Relevancy, Authentication, and Judicial Notice, Arizona State University, Tempe, AZ.

12-14: Institute for Court Management, Court Executive Development Program Introductory Workshop, Denver, CO.

12-17: ABA, Midyear Meeting, Philadelphia, PA.

19-20: Openness in Government Conference, Denver Marriott, Denver, CO.

22-27: American Academy of Judicial Education, Trial Judges Writing Program, University Inn, Coral Gables, FL.

23-24: ABA Center for Administrative Justice, Application of the Administrative Procedure Act, Meeting, Washington, D.C.

24-25: US Civil Service Commission CLE Program, Application of the APA to Administrative Proceedings, Washington, DC. Contact: Director of Legal Education, Legal Education Program, US Civil Service Commission, 1900 E St. NW, Room 7412, Washington, DC 20415.

25-27: University of Denver College of Law-Federal Publications Construction Contract Modifications, Cascades Meeting Center, Williamsburg, VA. Contact: Seminar Division, Fed-

eral Publications Inc, 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

25-28: National College of District Attorneys Course, Pretrial Problems Seminar, Stouffer's Greenway Plaza Hotel, Houston, TX. Contact: Registrar, National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004.

26-29: National College of Criminal Defense Lawyers and Public Defenders, Advanced Evidence, Washington, DC.

February 29-March 5: National College of District Attorneys Course, Prosecutor's Office Administrator Course, University of Houston Hotel, Houston, TX. Contact: Registrar, National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004.

MARCH

4-6: FBA, Southwestern Regional Conference, Seminars on Government Contracts and Federal Trial Practice, Hilton Palacio del Rio, San Antonio, TX.

7-10: National College of District Attorneys Course, Criminal Justice System Workshop. Contact: Registrar, National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004.

8-9: University of Santa Clara School of Law-Federal Publications, Defective Pricing, Royal Inn at the Wharf, San Diego, CA. Contact: Seminar Division, Federal Publications Inc. 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

9-11: US Civil Service Commission CLE Program, Seminar for Attorney Managers, Washington, DC. Contact: Director of Legal Education, Legal Education Program, US Civil Service Commission, 1900 E St. NW, Room 7412, Washington, DC 20415. Phone: 202-254-3483.

10-12: University of Denver College of Law-Federal Publications, Construction Contract Modifications, Tropicana Hotel, Las Vegas, NV. Contact: Seminar Division, Federal Publications

Inc, 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

12-13: ABA Section of Insurance, Negligence and Compensation Law, National Institute on Medical Legal Aspects of Litigation, Fairmont Colony Square, Atlanta, GA.

15-17: FBA/BNA Briefing Conference on Government Contracts, Warwick Hotel, Philadelphia, PA. Contact: BNA.

15-19: Federal Publications, Government Contract Claims, Washington, DC. Contact: Seminar Division, Federal Publications Inc. 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

18-19: ABA Section of Administrative Law, National Institute on Oversight and Review of Agency Decision-Making, The Mayflower, Washington, DC.

18-21: National College of Criminal Defense Lawyers and Public Defenders, Forensic Sciences, Houston, TX.

19-20: ALI-ABA, Practice Under the New Federal Rules of Evidence, Hilton Inn, Albuquerque, NM. Contact: Director for Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104.

21-26: National College of District Attorneys Course, Prosecutors Investigators School. Contact: Registrar, National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004.

23-25: US Civil Service Commission CLE Program, Trial Practice Seminar, Washington, DC. Contact: Director of Legal Education, Legal Education Program, US Civil Service Commission, 1900 E St. NW, Room 7412, Washington, DC 20415. Phone: 202-254-3483.

25-27: FBA Midwestern Regional Conference, Seminars on Openness in Government and Federal Trial Practice, Netherland Hilton, Cincinnati, OH.

26-27: Practising Law Institute, Eighth Annual Criminal Advocacy Institute, Acquiring, Preparing and Utilizing Forensic Experts, Sir

Francis Drake Hotel, San Francisco, CA. Contact: Public Information, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone: 212-765-5700.

29-31: University of Baltimore School of Business-Federal Publications, Small Purchasing, Sheraton National, Arlington, VA. Contact: Seminar Division, Federal Publications Inc. 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

29-31: Federal Publications, Practical Negotiation of Government Contracts, San Francisco, CA. Contact: Seminar Division, Federal Publications Inc, 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

APRIL

5-6: Federal Publications, Defective Pricing, Washington, DC. Contact: Seminar Division, Federal Publications Inc. 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

5-7: Federal Publications, Government Architect-Engineer Contracting, Las Vegas, NV. Contact: Seminar Division, Federal Publications Inc, 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

6-8: US Civil Service Commission CLE Program, Program Development and Legal Controls for Non-Lawyers, Washington, DC. Contact: Director of Legal Education, Legal Education Program, US Civil Service Commission, 1900 E St. NW, Room 7412, Washington, DC 20415. Phone: 202-254-3483.

6-10: National College of District Attorneys Course, Career Prosecutors Refresher Course, San Diego, CA. Contact: Registrar, National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004.

8-9: Openness in Government Conference, Hyatt on Union Square, San Francisco, CA.

8-9: ABA Section of Insurance, Negligence and Compensation Law, National Institute on Construction Contract Claims, Fairmont Hotel, San Francisco, CA.

8-10: ABA Section of Natural Resources, National Institute on Interdependence—The Law

of the Environment, Stouffer's Valley Forge Hotel, King of Prussia, PA.

12-16: Federal Publications, Masters Institute in Government Construction Contracting, Santa Barbara, CA. Contact: Seminar Division, Federal Publications Inc. 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

12-16: Federal Publications, Skills of Contract Administration, Washington, DC. Contact: Seminar Division, Federal Publications Inc, 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

19-30: US Civil Service Commission CLE Program, Procurement Law Course, Washington, DC. Contact: Director of Legal Education, Legal Education Program, US Civil Service Commission, 1900 E St. NW, Room 7412, Washington, DC 20415. Phone: 202-254-3483.

21-23: Federal Publications, Practical Negotiation of Government Contracts, Washington, DC. Contact: Seminar Division, Federal Publications Inc, 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

22: Medicolegal Workshop, Virginia Baptist Hospital, Lynchburg, VA. Contact: Medical College of Virginia, Virginia Commonwealth University, Box 91, MCV Station, Richmond, VA 28298.

22-24: ALI-ABA, Energy and the Law: Problems and Challenges of the Mid 70's, Hyatt Regency, Washington, DC. Contact: Director for Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104.

22-25: National College of Criminal Defense Lawyers and Public Defenders, Forensic Sciences, Boston MA.

25-28: Institute of Court Management, Seminar on Appellate Court Administration, Executive Tower, Denver, CO.

25-29: National College of District Attorneys Course, Trial Techniques Seminar, Houston, TX. Contact: Registrar, National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004.

April 30-May 1: ALI-ABA, Practice Under the New Federal Rules of Evidence, Seattle, WA.

April 30-May 2: ABA Standing Committee on Environmental Law, Conference on Environmental Law, Airlie House, Airlies, VA.

April 30-May 9: ABA Criminal Justice Section, Seminar on Selected Problems in Anglo-American Criminal Jurisprudence, London, UK.

JAG School Notes

1. FISCAL LAW COURSE. The 1st Fiscal Law Course (5F-F12) will be held from 9 February through 11 February 1976. The course is designed for military and civilian procurement attorneys and comptrollers. The course will cover the statutory constraints and administrative procedures involved in the system of appropriation, control, and obligation of funds within the Department of Defense. Emphasis will be on how procurement, legal, and financial experts must work together in order to avoid overobligations. Immediately following the 66th Procurement Attorneys' Course in late April and early May there will be a second Fiscal Law Course from 12 May through 14 May 1976.

2. PROCUREMENT COURSE. The 65th Procurement Attorneys' Course will be conducted from 8 March through 19 March 1976. The two-week course will cover the planning, solicitation, award, performance, and disputes resolution phases of federal procurement. The course is primarily for the benefit of those government attorneys with less than six months experience in procurement.

3. AUDIO AND VIDEO TAPES. Recent additions have been made to the growing list of audio and video cassettes available at The Judge Advocate General's School. Listed below are audio tapes recently published by TJAGSA and video

cassettes completed since the publication in January of our Video Tape Catalog. The catalog has been distributed to all staff judge advocates. A limited number are available for personal use upon request.

Video tapes are available from TJAGSA by sending a blank video cassette to the Audio/Visual Division. Audio tapes will be reproduced for you upon receipt of a blank cassette or upon

purchase of a blank cassette from the Bookstore at TJAGSA. The cost of a 60-minute cassette is \$.70, a 90-minute cassette is \$1.00, and a 120-minute cassette is \$1.25. Checks should be made to "Fort Lee Exchange, Branch 1603." Audio cassettes are also available on a loan basis from TJAGSA. Requests should be sent to Commandant, The Judge Advocate General's School, U.S. Army, ATTN: DDNRI, Charlottesville, Virginia 22901.

VIDEO TAPES

| TAPE NUMBER | TITLE | RUNNING TIME | TAPE NUMBER | TITLE | RUNNING TIME |
|----------------|--|-----------------|----------------|--|-----------------|
| | Sixth Advanced Procurement Attorneys Course | | | | |
| JA-103-1 | How the Disputes Clause Developed, Part I | 49:30 | JA-103-24 | Legal Problems Under P.L. 85-804, Part II | 45:00 |
| JA-103-2 | How the Disputes Clause Developed, Part II | 52:30 | JA-103-25 | Functions of the General Accounting Office, Part I | 48:30 |
| JA-103-3 | The Appeals Board Today, Part I | 44:30 | JA-103-26 | Functions of the General Accounting Office, Part II | 52:30 |
| JA-103-4 | The Appeals Board Today, Part II | 61:00 | JA-103-27 | Bid Protests and the General Accounting Office, Part I | 48:30 |
| JA-103-5 | Current Disputes Legislation—Impact on Contractor, Part I | 47:00 | JA-103-28 | Bid Protests and the General Accounting Office, Part II | 46:00 |
| JA-103-6 | Current Disputes Legislation—Impact on Contractor, Part II | 41:00 | JA-103-29 | Cost Principles, Part I | 47:00 |
| JA-103-7 | Rodino Bill—Impact on Government, Part II | 51:30 | JA-103-30 | Cost Principles, Part II | 52:00 |
| JA-103-8 | Rodino Bill—Impact on Government, Part I | 41:00 | JA-103-31 | The Cost Accounting Standards Board, Part I | 60:00 |
| JA-103-9 | Practice at the Chief Trial Attorneys' Office, Part I | 50:00 | JA-103-32 | The Cost Accounting Standards Board, Part II | 30:00 |
| JA-103-10 | Practice at the Chief Trial Attorneys' Office, Part II | 42:00 | JA-103-33 | Practice Before the Court of Claims, Part I | 42:00 |
| JA-103-11 | Pretrial Practice Before the Boards, Part I | 31:30 | JA-103-34 | Practice Before the Court of Claims, Part II | 45:00 |
| JA-103-12 | Pretrial Practice Before the Boards, Part II | 58:00 | JA-103-35 | The Court of Claims, Part I | 44:00 |
| JA-103-13 | Celebrated Cases Before the Boards, Part I | 42:00 | JA-103-36 | The Court of Claims, Part II | 41:00 |
| JA-103-14 | Celebrated Cases Before the Boards, Part II | 42:00 | JA-103-37 | Government Procurement and the Future, Part I | 41:00 |
| JA-103-15 | Practice Before the Boards and Courts, Part I | 51:00 | JA-103-38 | Government Procurement and the Future, Part II | 32:00 |
| JA-103-16 | Practice Before the Boards and Courts, Part II | 48:00 | 1 | 1975 JAG Reserve Conference Teaching Demonstration on Non-judicial Punishment, Captain Dort, TJAGSA | 42:30 |
| JA-103-17 | Freedom of Information, Part I | 42:00 | 2 | Teaching Demonstration on Administrative Boards, Part I, Administrative and Civil Law Staff, TJAGSA | 55:00 |
| JA-103-18 | Freedom of Information, Part II | 52:00 | 3 | Teaching Demonstration on Administrative Boards, Part II, Administrative and Civil Law Staff, TJAGSA | 23:30 |
| JA-103-19 | Minor Construction, Part I | 40:00 | 4 | New Developments in Claims Administration, Colonel Boyle, | 34:00 |
| JA-103-20 | Minor Construction, Part II | 41:00 | | | |
| JA-103-21 | Overview of the Army Contract Adjustment Board, Part I | 49:00 | | | |
| JA-103-22 | Overview of the Army Contract Adjustment Board, Part II | 49:00 | | | |
| JA-103-23 | Legal Problems Under P.L. 85-804, Part I | 61:00 | | | |

VIDEO TAPES

| TAPE NUMBER | TITLE | RUNNING TIME | TAPE NUMBER | TITLE | RUNNING TIME |
|----------------|--|-----------------|--------------------|--|-----------------|
| 5 | Chief, U.S. Army Claims Service Freedom of Information Act and the Privacy Act, Part I, Captain Strassburg, TJAGSA | 48:00 | JA-512 | Drug Abuse—Nine-in-One Concepts (AFIF 213) | 41:00 |
| 6 | Freedom of Information Act and the Privacy Act, Part II, Captain Strassburg, TJAGSA | 44:00 | JA-513 | Alcoholism—Out of the Shadows (AFIF 220) | 26:00 |
| JA-239 | The Operation of the Adminis- trative Law Division, OTJAG, Major Rice | 49:30 | JA-514 | Chalk Talk on Alcoholism, Part I (AFIF 245) | 42:00 |
| JA-316 | Constitutional Evidentiary Problem No. 1: Self-Incrimination and Immunity—Fifth Amend- ment, Criminal Law Staff, TJAGSA | 52:00 | JA-515 | Chalk Talk on Alcoholism, Part II (AFIF 245) | 25:00 |
| JA-317 | Constitutional Evidentiary Problem No. 2: The Warning Requirement—Fifth Amendment ³¹ , and Article 31, Criminal Law Staff, TJAGSA | 47:00 | JA-516 | Alcohol, Drug of Choice (AFIF 255) | 25:00 |
| JA-318 | Constitutional Evidentiary Problem No. 3: Right to Counsel at Pretrial Stages—Fifth Amendment, Criminal Law Staff, TJAGSA | 54:00 | JA-517 | Keeping It All Together (TAR 46) | 22:00 |
| JA-419 | The Geneva Protocols, Part I, Mr. Harry Almond, Mr. Waldemar Solf, LTC Miles, USAF | 57:42 | AUDIO TAPES | | |
| JA-420 | The Geneva Protocols, Part II Mr. Harry Almond, Mr. Waldemar Solf, LTC Miles, USAF | 14:45 | | | |
| JA-421 | The Geneva Conventions and the Medic (TF 21-4719) | 28:00 | JA-A-101 | Wage Standards in Government Contracts—An Overview, Captain Brooks, TJAGSA | 21:00 |
| JA-422 | The Geneva Conventions and the Civilian (TF 21-4720) | 28:00 | JA-A-102 | Wage Standards in Government Contracts—The Walsh-Healey Act and the Contract Work Hours and Safety Standards Act, Captain Brooks, TJAGSA | 27:00 |
| | | | JA-A-103 | Wage Standards in Government Contracts—The Davis-Bacon Act, Captain Brooks, TJAGSA | 27:00 |
| | | | JA-A-104 | Wage Standards in Government Contracts—The Service Contract Pact, Captain Brooks, TJAGSA | 36:00 |
| | | | JA-A-232 | The Freedom of Information Act, 1975, Captain Strassburg, TJAGSA | 74:00 |
| | | | JA-A-233 | The Privacy Act of 1974, Captain Strassburg, TJAGSA | 45:00 |
| | | | JA-A-305 | The New COMA, Where Is It Going? Captain Cooke, TJAGSA | 21:50 |

JUDICIARY NOTES

From: U.S. Army Judiciary

1. RECURRING ERRORS AND
IRREGULARITIES

a. *December 1975 Corrections by ACOMR of
Initial Promulgating Orders:*

(1) Failing to set forth the correct social se-
curity number of the accused—two cases.

(2) Failing to include the proper wording in
the specification of a charge—two cases.

(3) Failing to indicate in the Findings para-
graph that the specification of a charge had been
dismissed by the military judge after findings—
one case.

b. *The following errors were noted in the final
promulgating order as evidenced by messages to
the field commands:*

(1) Failing to indicate that accused's punitive
discharge has been suspended.

(2) Failing to show that initial promulgating order had been corrected by an ACOMR Court-Martial Order Correcting Certificate.

(3) Erroneously using the words "In the general court-martial case of _____" when, in fact, the accused had been tried by a special court-martial.

(4) If the initial promulgating order orders the sentence into execution, and it is subsequently affirmed without modification pursuant to Article 66, it is not necessary to publish a supplementary court-martial order again ordering the sentence into execution.

2. Notes from Examination and New Trials Division

a. Supervisory Review—Article 65(c)

Paragraph 2-24b(4), AR 27-10, clearly indicates that the Staff Judge Advocate is responsible for the proper review of records of trial by summary courts-martial and records of trial by special courts-martial (without an approved BCD). A number of such cases, brought to the attention of TJAG pursuant to applications for relief under Article 69, have contained patent errors and irregularities which should have been detected and corrected at the time of the supervisory authority's review. The frequency of uncorrected errors leads to the conclusion that the importance of Article 65(c) review is not appreciated by many judge advocates. For all practical purposes, it is the final review within the meaning of Article 76. To protect fully the interests of both the accused and the Government, the judge advocate performing the supervisory review must assure that the proceedings, findings, and sentence, as approved by the convening authority, are correct in law and fact, in all respects, before the record is declared to be legally sufficient. The Court-Martial Data Sheet (DD Form 494) is a useful guide. It must be perused carefully and each item thereof checked against the record of trial and its allied papers.

b. Record of Trial—Rehearing

A number of cases have recently been returned to convening authorities for rehearing. It should be noted that Instruction 12 on the back

cover sheet of DD Form 490 requires that the "record of the former trial" be attached to the record of trial on rehearing. This provision is also applicable when the findings and sentence of a general court-martial are set aside and a rehearing ordered before a non-BCD special court-martial. In such instances, the original record of trial of that proceeding should, after review pursuant to Article 65(c), be forwarded to the U.S. Army Judiciary with two copies of the stamped court-martial promulgating order. A copy of the general court-martial record of trial should, of course, be joined to the office copy of the special court-martial record.

c. Distribution of Court-Martial Orders

Copies of court-martial orders promulgating the results of trial in summary courts-martial and special courts-martial (without an approved BCD) should not be forwarded to either OTJAG (JAJA-CL) or the U.S. Army Judiciary, (JAAJ-CC; JAAJ-ED). SJAs should take appropriate action to remove those agencies from their distribution formula.

d. Court-Martial Orders

The authority paragraph of a court-martial order promulgating the results of trial should reflect all the court-martial convening orders which detailed the military judges who participated in the proceedings. For example, if a military judge held an Article 39(a) session in the case and was later "viced" for good cause, both convening orders should be cited. Convening orders should not, however, be shown as amending orders when they convene an entire new court. Note the following sample authority paragraphs:

(1) Charges referred to Court A (CMCO 1); re-referred to Court B (CMCO 2); proceedings only before MJ detailed to Court B: "Before a general court-martial which assembled at . . . pursuant to Court-Martial Convening Order Number 2, . . ."

(2) Charges referred to Court C (CMCO 3); MJ viced by CMCO 4; proceedings before original and new MJ: "Before a general court-martial which assembled at . . . , pursuant to Court-Martial Convening Order Number 3, . . . , as amended by Court-Martial Convening Order Number 4, . . ."

(3) Charges referred to Court D (CMCO 5); re-referred to Court E (CMCO 6); proceedings before original MJ and new MJ: "Before a general court-martial which assembled at . . . , pursuant to Court-Martial Convening Order Number 5, . . . and Court-Martial Convening Order Number 6,"

(4) Charges referred to Court F (CMCO 7);

re-referred to Court G (CMCO 8); second MJ "viced" by CMCO 9; proceedings before all MJ's: "Before a general court-martial which assembled at . . . , pursuant to Court-Martial Convening Order Number 7, . . . and Court-Martial Convening Order Number 8, . . . , as amended by Court-Martial Convening Order Number 9,"

Drug Offenses: Pleading and Proving

By: Captain Gary F. Thorne, Government Appellate Division, U.S. Army Legal Services Agency, Falls Church, Virginia

In light of the various number of drug offenses arising in the military, trial counsel should carefully consider the available alternatives for charging and proving these numerous offenses. The avenue chosen will dictate both the necessary elements of proof and the potential punishment which may be imposed. The variances as to both of these matters dictates that the specification to be used be seriously considered as to form prior to the filing of the charge. This article presents a general picture of the available avenues of approach, with the recognition that numerous cases continue to be appealed regarding proof and pleadings in drug cases, thus necessitating a careful watch by trial counsel in assessing how to charge accused drug offenders.

Article 134(1) and (2)

Drug offenses may be charged under Article 134(1) and (2). These general provisions have the elements thereof specifically set forth in the Manual, including those common to all 134 offenses, plus proving knowledge of the accused as to the presence and nature of the drugs. The burden of proof on the Government under these provisions is generally easy to meet. The problem in implementing Article 134 is that the Manual specifically states this general article is to be used sparingly "[I]f conduct of this nature is specifically made punishable by another article, it should be charged as a violation of that Article. . . ." ¹ Exactly how this provision is to be applied in the case of drug offenses is not clear. Because most drug offenses may be charged under Article 92, the argument exists that to charge under 134(1) or (2), or even 134(3), viol-

ates the intent of Article 134. ² The counter to this argument is that the Manual makes the statement cited above in permissive and not mandatory terms. Thus far the Court of Military Appeals has upheld this use of Article 134. ³ However, this issue is presently pending before the Court of Military Appeals in numerous cases and prosecutors should be aware of the potential for a change in the law. It is unclear whether the gravaman of the attack of this use of Article 134 is the punishment differential between 134 and 92, or simply that 134 cannot be so employed. The decisions in *United States v. Jackson*, No. 30,812 and *United States v. Courtney*, No. 30,864, both yet to be argued, should answer these questions.

A second area that should be noted by trial counsel is the wording of the Manual that states: "It is a violation of this article wrongfully to possess or use marihuana or a habit forming narcotic drug." ⁴ Whether this limits the prosecution of drug offenses under 134(1) and (2) to those drugs fitting that strict definition or allows for prosecution regardless of the drug involved if the use or possession prejudices good order and discipline is a question the Court of Military Appeals has not specifically answered. However, a Court of Military Review decision indicates that prosecution under Article 134 is not limited to drugs fitting the marihuana or habit forming narcotic definition. ⁵ A review of the cases cited in this article also indicates that the Court of Military Appeals has never indicated that Article 134 should be so limited.

The maximum punishment under these provisions is derived from the Table of Punishments in the Manual. In the case of *habit forming narcotic*

drug offenses, that maximum punishment is a dishonorable discharge and confinement at hard labor for ten years. In marihuana cases, it's a dishonorable discharge and five years. Because the Table specifically refers to 134's application to habit forming narcotic drugs, the question arises as to whether the table may be invoked where a non-habit forming drug is the substance of the charge. The Court of Military Appeals has answered this question in the negative.⁶ Punishment for such convictions is derived from the United States Code or the District of Columbia Code, whichever imposes the lesser punishment.⁷

As previously noted, in order to invoke these provisions of Article 134, the conduct should not be punishable by another Article of the Code. However, the Court of Military Appeals did not reverse a drug offense conviction obtained under Article 134 when an Army Regulation existed which would have justified the imposition of a charge under Article 92.⁸ Additionally, the Court ruled that the existence of the regulation and a specific punishment under Article 92 did not alter the procedure of examining the U.S. and D.C. Codes for the maximum punishment, even if the penalties there were greater than would have been imposed if convicted under Article 92.⁹

Article 134(3)

A second means of charging drug offenses is the use of Article 134(3). This is the provision that allows crimes and offenses that are not capital to be charged where such conduct is not made punishable by another Article in the Code. The burden of proof and wording of the specification are more difficult when a crime is so alleged since a federal statute must be cited in order to invoke this section. The federal law is drug cases if found in 21 U.S.C. § 802, *et. seq.* In alleging such an offense the government must be certain that all elements of the federal offense are included in the specification, including specific intent if so necessitated.¹⁰ A failure to do so clearly opens the specification up for attack at the trial level, although if not raised at that level the appellate courts have found that an automatic reversal is not necessitated, but rather the courts will view

the entire record to determine whether the specification gave proper notice to the appellate of the charge against him.¹¹ In utilizing this portion of the article, the careful prosecutor requests the military judge to take judicial notice of the statutory provision of the code which prohibits the alleged conduct.

To insure that problems of pleading will not arise, the specific portion of the statute used should be researched for a complete understanding of the elements. The most common problem in this area is whether the statute involves a specific intent which must be set forth in the specification. As to the possession and distribution of narcotic drugs under the U.S. Code, the Court of Military Review has determined that the knowing or intentional possession or distribution cited in the U.S. Code is general in nature and a specification is sufficient if it refers to the "wrongful" possession or distribution.¹² Nevertheless, precisely wording the specification to conform to the statute should be the practice.

The punishment which may be imposed is that found in the Table of Maximum Punishments and is the same as can be imposed were the charge to have arisen under Article 134(1) or (2). This results from determinations that where Article 134(3) is involved, the maximum imposable punishment is determined by first searching the Table of Maximum Punishments for a specifically established punishment.¹³ The Table would thus cover the wrongful possession, sale, transfer, use or introduction into a military unit, base, station, post, ship or aircraft of habit forming drugs or marihuana.

If the drug offense charged does not fall within these bounds, the next resort is to find a closely related offense in the Table, and if none exists, final resort is to the United States Code or District of Columbia Code, whichever punishment is less.¹⁴

The use of Article 134 to allege drug violations varies in nature depending upon which section of the article is invoked. Under Section (3), the degree of difficulty in proof increases due to the necessity of proving the elements involved in a statute cited. Such is not true under Section (1)

and (2). So long as all types of drug offenses can be alleged under 134(1) and (2) the Government only opens itself up for error by invoking Section (3). In addition, nothing is gained in maximum punishment by implementing 134(3) and apparently federal drug statutes have no extra-territorial effect and can not be used overseas to implement 134(3).¹⁵

Article 92

Another means of charging drug offenses is the use of Article 92 by either invoking a general order or regulation or referring to post regulations. AR 600-50 is the regulation invoked in most drug offenses. The provision calls for punitive measures for use, possession, sale, distribution, delivery, possession, compounding, or manufacturing any controlled substances as defined by the Controlled Substances Act.¹⁶ The reference in the regulation to the United States Code for defining controlled substances has resulted in judicial recognition of that U.S. Code section by the Court of Military Review.¹⁸ The burden of proof under this provision is relatively simple, since the existence of the order, a duty to obey and a violation thereof constitutes a violation of the Article.¹⁹ The maximum imposable punishment under the Table is a dishonorable discharge and two years confinement.

Article 92 may also be used to charge drug offenses under local post regulations. Again, construction of the regulation will be strict and must clearly be punitive in nature to result in a conviction.²⁰ The burden of proof is somewhat heightened by the requirement that specific knowledge of the order by the accused be proven.²¹ Judicial notice of the post regulation is required and pertinent portions should be extracted and offered as appellate exhibits. The punishment, when compared to other means of alleging drug offenses, is substantially less under the Table—a bad-conduct discharge and six months confinement.

While the punishment is less, a drug pleading under Article 92 citing a general order or regulation seems to be the least open to attack upon appeal and the simplest in nature to prove. However, it is not clear whether all ramifications of AR 600-50 have yet been explored, particularly in light of citing the Controlled Substances Act.

While the courts have been willing to judicially recognize that portion on the U.S. Code cited in AR 600-50, the Court of Military Review has refused to extend this judicial recognition to other definitional sections of the Code.²² In that case the accused was found guilty of unlawful delivery of marihuana. It was clear that delivery had never actually occurred and the plea was allowed to rest on attempted delivery, with the Government relying on the definition of delivery under the U.S. Code that includes an attempt to deliver.²³ However, because the charge was under AR 600-50, which does not define deliver as an attempt to do so and does not adopt the definitional sections of the U.S. Code dealing with drugs, in order to find an attempt to deliver, the court ruled that attempt under Article 80 must be proven. Simply showing some marihuana to a potential buyer did not meet the standards of Article 80. The court noted that the proper charge should have been under Article 80 and worded as an attempt to violate a regulation by attempting to deliver marihuana. If this approach is upheld, the use of the U.S. Code is limited to that portion that describes controlled substances as referred to in the regulation. Counsel should not expect judicial recognition of other sections of the Code either at trial or on appeal.

Conclusion

This examination of the manner of pleading drug offenses has noted some of the advantages and disadvantages involved with each form. The punishments also substantially vary depending on the procedure chosen. It would seem the primary concern should be given to the specificity with which an offense can be alleged and the degree of difficulty in proving the charge under any given form.

In seeking federal statutes under which to bring charges it should be recognized that jurisdictional questions are bound to arise. The Court of Military Appeals has ruled in one instance that despite a federal regulation concerning the smuggling of marihuana into the United States there is no jurisdiction in the court-martial system to hear such offenses.²⁴ Additionally, the Court of Military Appeals has ruled that the possession of narcotic paraphernalia *on post* does not

violate Article 134, since such possession does not have a direct effect on the serviceman's good order and discipline.²⁵ Such offenses may be charged under an appropriate regulation or order. The Court of Military Appeals present inclination seems to be that drug offenses should be charged under 92, perhaps inviting the services to draw up regulations that will cover all drug offenses rather than relying on 134.

If a regulation exists, they should be used as the path of least resistance, unless the ultimate concern is with the degree of punishment, in which case use of Article 134(1) and (2) is available.

An additional concern in charging drug offenses is the jurisdictional issue. The Court of Military Appeals is reviewing this entire issue in *United States v. McCarthy*, No. 30,560, and *United States v. Lampe*, No. 30,337. The issue in these cases is whether court-martial jurisdiction exists when drug offenses occur off post. Until these cases are decided, trial counsel can simply cite *United States v. Sexton*, 23 USCMA 101, 38 CMR 662 (1974), and the cases cited therein in response to jurisdictional motions.

Footnotes

1. MANUAL FOR COURTS-MARTIAL, 1969 (Rev. ed.), para. 213a [hereinafter cited as MCM].
2. See *United States v. Walter*, 20 U.S.C.M.A. 367, 372, 43 C.M.R. 207, 212 (1971) (Ferguson, J., dissenting).
3. *Id.* at 367-72, 43 C.M.R. 207-12.
4. MCM, para. 213b.
5. *United States v. Martin*, 50 C.M.R. 314 (ACMR 1975), *aff'd*, 23 U.S.C.M.A. 476, 50 C.M.R. 495 (1975).
6. *United States v. Smith*, 22 U.S.C.M.A. 528, 48 C.M.R. 13 (1973); *United States v. Tarnes*, 18 U.S.C.M.A. 55, 39 C.M.R. 55 (1968).
7. *United States v. Smith*, 22 U.S.C.M.A. 528, 48 C.M.R. 13 (1973).

8. *United States v. Walter*, 20 U.S.C.M.A. 367, 43 C.M.R. 207 (1971).
9. *Id.*
10. *United States v. Johnson*, 48 C.M.R. 282 (ACMR 1974), *pet. denied*, ____ U.S.C.M.A. ____, 48 C.M.R. 1000 (1974).
11. *United States v. Dickerson*, 48 C.M.R. 150 (ACMR 1973).
12. *United States v. Johnson*, 48 C.M.R. 282, 285 (ACMR 1974), *pet. denied*, ____ U.S.C.M.A. ____, 48 C.M.R. 1000 (1974).
13. *United States v. Almendarez*, 46 C.M.R. 814 (ACMR 1972).
14. *Id.* Counsel should be aware that Section 33-701(c) of the D.C. Code allows the Counsel of the District of Columbia to declare specific drugs to be covered under the Code even though not initially listed in the statute itself. On 27 December 1974 this provision was employed to declare LSD a nonnarcotic dangerous drug under Section 33-702(a)(4) of the D.C. Code. While a drug may not be listed in the body of that Code, a check with the D.C. Counsel is necessary to determine if it has subsequently been added.
15. *United States v. Martin*, 50 C.M.R. 314, 315, n.1 (ACMR 1975), *aff'd* 23 U.S.C.M.A. 476, 50 C.M.R. 495 (1975).
16. Army Reg. No. 600-50, para. 4-2(7)(a) (27 August 1975).
17. *United States v. Koepke*, 18 U.S.C.M.A. 100, 39 C.M.R. 100 (1969).
18. *United States v. Crawford*, 44 C.M.R. 342 (ACMR 1971), *pet. denied*, ____ U.S.C.M.A. ____, 44 C.M.R. 939 (1971).
19. MCM, para. 171.
20. *United States v. Scott*, 22 U.S.C.M.A. 25, 46 C.M.R. 25 (1972); *United States v. Mardell*, 21 U.S.C.M.A. 327, 45 C.M.R. 101 (1972).
21. MCM, para. 171; *United States v. Johnson*, 48 C.M.R. 282, 284 (ACMR 1974), *pet. denied*, ____ U.S.C.M.A. ____, 48 C.M.R. 1000 (1974).
22. *United States v. Quick*, 50 C.M.R. 112 (ACMR 1975).
23. 21 U.S.C. § 802(8) (1970).
23. *United States v. Pieragowski*, 19 U.S.C.M.A. 508, 42 C.M.R. 110 (1970).
24. *United States v. Caballero*, 23 U.S.C.M.A. 304, 49 C.M.R. 594 (1975).

CHECK LIST OF POST-TRIAL REVIEW ERRORS

By: Captain Michael P. LaHaye, Defense Appellate Division, U.S. Army Legal Services Agency, Falls Church, Virginia

The United States Court of Military Appeal's recent decision in *United States v. Goode*, 23

USCMA 367, 50 CMR 1 (1975) has imposed upon trial defense counsel the burden of insuring that

his client receives a full and fair post-trial review by the convening authority. The exact scope of that burden has yet to be defined. *Goode* suggests, however, that the defense counsel must correct or challenge, "any matter he considers erroneous, inadequate, or misleading, or on which he otherwise wishes to comment." *United States v. Goode*, 23 USCMA at 370, 50 CMR at 4. In *United States v. Austin*, SPCM 9868 (ACMR 9 June 1975), the Court of Military Review limited the application of the waiver rule established by *Goode* to the inclusion in the review of "adverse matters from outside the record." See also *United States v. Richardson*, CM 433662 (ACMR 25 November 1975).

Until the parameters of the *Goode* rule are more firmly established, it will be incumbent upon defense counsel to challenge every error or inaccuracy in the post-trial review which detracts from the fairness of the review. To assist in this process, the checklist which follows has been developed. It is designed to cover most of the errors commonly encountered in post-trial reviews within recent years. Accompanying the checklist, is a notes section which cites case law relevant to each of the errors listed in the checklist.

CHECKLIST OF SJA REVIEW ERRORS

Preliminary Matters

- 1. Is the record properly authenticated and does the date of authentication precede the date of the post-trial review?
- 2. Did any witness testify pursuant to a pretrial agreement, grant of immunity, or a grant of any type of clemency by the convening authority, a subordinate commander, the staff judge advocate, or trial counsel?
- 3. Did the staff judge advocate or convening authority testify as to any matter?
- 4. Did the officer who prepared the review have any prior participation in the proceeding or a related proceeding?
- 5. Has the convening authority made any "policy statements" indicative of a fixed attitude toward the treatment of the

sentences of a specified class of offenders?

Synopsis of the Record

- 6. Is any item of personal data omitted or erroneously stated, particularly;
 - the character and length of pre-trial restraint
 - awards and decorations
 - character of the accused's service?

Summary of the Evidence

- 7. Does the summary of the evidence adequately and accurately reflect the accused's theory of defense, the evidence supporting that theory, and prosecution evidence favorable to the defense?
- 8. Is the accused's testimony on the merits accurately summarized?

Discussion

- 9. In a contested case, does the review properly set forth the elements of the offense and does it relate the facts to those elements?
- 10. Does the review discuss the elements of an offense of which the appellant was acquitted?
- 11. If the accused was found guilty of a lesser included offense than the offense charged, does the review set forth the elements of the lesser included offense rather than the more serious offense?
- 12. Are any defenses raised by the accused discussed and are legal guidelines provided to assess the merits of those defenses?
- 13. Does the review discuss all defense motions?
- 14. Does the review properly advise that evidence of the accused's character offered on the merits shows the "probability of his innocence"?
- 15. If any witness testified pursuant to a pretrial agreement, grant of immunity,

or other grant of clemency, is the convening authority so advised in the review?

- 16. Does the review suggest that the convening authority is bound by the court's findings as to the credibility of witnesses or other factual issues?
- 17. Is the convening authority consistently advised that he must be convinced of guilt beyond a reasonable doubt?
- 18. Does the staff judge advocate give reasons to support his opinions on the sufficiency of the evidence or on the merits of other contested issues?
- 19. Are the staff judge advocate's opinions supported by the evidence?
- 20. Does the review correctly reflect the accused's plea and is it consistent throughout the review?
- 21. In a guilty plea case, does the review indicate that the judge had difficulty in obtaining a provident plea?

Clemency

- 22. Does the review state the correct maximum punishment?
- 23. If the military judge ruled that any of the charges and specifications were multiplicitous does the review so state?
- 24. Is all evidence and testimony favorable to the accused fully summarized in the review?
- 25. Does the review properly reflect the accused's attitude toward rehabilitation and retention in the Army?
- 26. If the appellant submitted any clemency letters or petitions after trial are they appended to and discussed in the review?
- 27. Does the review suggest that a previous Article 15 or court-martial conviction was properly considered, when in fact such records were not admissible at trial?
- 28. Does the review offer in aggravation evidence declared inadmissible at trial

or never offered at trial because it was deemed inadmissible?

- 29. Are any prior juvenile, civilian or military arrests or convictions which were not introduced at trial discussed?
- 30. Does the review refer to any post-trial misconduct?
- 31. Does the post-trial interview summary contain any opinion as to the accused's attitude which requires rebuttal?

Recommendations As To Sentence

- 32. Did the military judge, a court member, trial counsel, accused's unit commander, or an intermediate commander recommend any form of clemency including: referral to court not authorized to adjudge BCD, suspension of BCD, administrative elimination, or disapproval of the discharge? If so, does the review mention the recommendation and does it summarize it fairly?
- 33. Does the review properly advise the convening authority of his powers to sentence and does it refrain from suggesting an inflexible policy consideration as to sentence?
- 34. In a guilty plea case, does the recommendation as to sentence conform to the pretrial agreement. If not, is any departure fully discussed and justified?

Miscellaneous

- 35. Does the review contain any indication of racial bias?
- 36. In your review of the record of trial have you discovered any legal errors or irregularities not brought out at trial?

Notes

1. The post-trial review must be based on an authenticated record. Para. 82f, *MCM*
United States v. Hill, 22 USCMA 419, 47 CMR 397 (1973)
2. a. Disqualification by reason of convening authority giving a witness a favorable pretrial agreement in exchange for testimony.
United States v. Albright, 9 USCMA 628, 26 CMR 408 (1958)

United States v. Diaz, 22 USCMA 52, 46 CMR 52 (1972)
United States v. Sierra Albino, 23 USCMA 63, 48 CMR 534 (1974)—subordinate commander entered pretrial agreement with witness
United States v. Hurd, 49 CMR 671 (ACMR 1974)

b. Disqualification by reason of convening authority's or subordinate's grant of immunity to a witness
United States v. Maxfield, 20 USCMA 496, 43 CMR 336 (1971)—acting convening authority's grant of immunity bars review by convening authority upon return
United States v. Williams, 21 USCMA 292, 45 CMR 66 (1972)—failure of SPCM convening authority to refer charge against the witness can amount to a grant of immunity
United States v. Chavez-Rey, 23 USCMA 412, 50 CMR 294 (1975)—subordinate commanders made promises of immunity and clemency

c. Disqualification by reason of offer of clemency in exchange for testimony of witness
United States v. Dickerson, 22 USCMA 489, 47 CMR 790 (1973)—subordinate commanders agreed to refer witness's charges to non-BCD special court and to suspend any confinement
United States v. Espiet-Betancourt, 23 USCMA 533, 50 CMR 672 (1975)—convening authority disqualified by subordinate commander's offer of Article 15 punishment to witnesses
United States v. Ward, 23 USCMA —, 50 CMR — (1975)—staff judge advocate offered witnesses Article 15 punishment

3. Staff judge advocate or the convening authority may be disqualified by his testimony at trial.
United States v. McGlenny, 5 USCMA 507, 18 CMR 181 (1955)
United States v. Taylor, 5 USCMA 523, 18 CMR 147 (1955)
United States v. Choice, 23 USCMA 329, 49 CMR 663 (1975)—test is that of objective reasonableness. Is the reviewing authority put in the position of weighing his testimony against other conflicting or contradictory evidence.
United States v. Rumpfelt, 49 CMR 54 (1975) staff judge advocate disqualified by reason of his testimony on speedy trial motion. *But see U.S. v. Choice, supra.*

4. a. Trial counsel can not prepare the review
United States v. Coulter, 3 USCMA 657, 14 CMR 75 (1954)
United States v. Metz, 16 USCMA 140, 36 CMR 296 (1966)
United States v. Davis, 47 CMR 13 (1973)—acting SJA was detailed previously as trial counsel.

b. No person who has acted as a member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in a case may later prepare the review
United States v. Thomas, 3 USCMA 798, 14 CMR 216 (1954)

United States v. Turner, 7 USCMA 38, 21 CMR 164 (1956)
United States v. Valenzuela, 7 USCMA 45, 21 CMR 171 (1956)
United States v. Hardy, 11 USCMA 521, 29 CMR 337 (1960)
United States v. Mallicote, 13 USCMA 374, 32 CMR 374 (1962)
United States v. Jolliff, 22 USCMA 95, 46 CMR 95 (1973)

5. The convening authority may be disqualified because he has expressed a fixed attitude toward the treatment of a specific class of offenders
United States v. Wise, 6 USCMA 472, 20 CMR 188 (1955)—convening authority announced he would not suspend or remit punitive discharges.
United States v. Howard, 23 USCMA 187, 48 CMR 939 (1974)—convening authority issued statement indicating a firm determination to approve the adjudged sentence of drug offenders.
United States v. Lacey, 23 USCMA 334, 49 CMR 738 (1975)—larceny offenders should be eliminated from Army as a matter of policy.

6. a. Pretrial Confinement
United States v. Barker, 44 CMR 610 (ACMR 1974)

b. Decorations and Awards
United States v. Morigeau, 41 CMR 714 (ACMR 1970)

c. Character of Service
United States v. Evans, 49 CMR 675 (ACMR 1974)

7. While there is no requirement that the review strike an exact balance, it is inadequate if defense evidence is so briefly summarized that the convening authority is not on notice of the accused's theory of defense and the evidence supporting it.

United States v. Collier, 19 USCMA 580, 42 CMR 182 (1970)—omitted testimony of officer who stated he would not believe government's witness under oath but would believe the accused.
United States v. Cruse, 21 USCMA 286, 45 CMR 60 (1972)
United States v. Chandler, 22 USCMA 73, 46 CMR 73 (1972)—testimony of prosecution witness inaccurately summarized.
United States v. Samuels, 22 USCMA 238, 46 CMR 238 (1973)—review omitted testimony relevant to key issue of identification.
United States v. Lindsey, 23 USCMA 9, 48 CMR 265 (1974)
United States v. Smith, 23 USCMA 98, 48 CMR 659 (1974)—failed to discuss criminal background of government's witness and failed to discuss testimony of a defense witness who corroborated accused's testimony.
United States v. Scaife, 23 USCMA 234, 49 CMR 287 (1974)—failed to indicate that no witness or the victim could identify the accused and persisted in using the accused's name as the perpetrator when discussing the facts surrounding the commission of the offense.

- United States v. Savina*, 23 USCMA 414, 50 CMR 296 (1975)
United States v. Gittings, 48 CMR 967 (ACMR 1974)—106 record pages of defense testimony reduced to 6 lines in review whereas 60 pages of prosecution evidence occupied 47 lines.
8. Proper summarization of the accused's testimony is vital.
United States v. Evans, 49 CMR 674 (ACMR 1974)—review refers to confession and other incriminating statements but fails to delineate the substance of those statements or the circumstances under which they were made.
United States v. Gaines, 49 CMR 701 (ACMR 1974)—misstatement by taking the accused's testimony out of context.
 9. The review must properly set forth the elements of the offense in a contested case
United States v. Samuels, 22 USCMA 238, 46 CMR 238 (1973)
United States v. Donoho, 46 CMR 691 (ACMR 1972)
United States v. Carman, 46 CMR 1292 (ACMR 1973)
United States v. Morgan, 50 CMR 589 (ACMR 1975) (Judge O'Donnell's dissent) review should discuss aider and abettor theory where accused convicted on that theory.
 10. A review which discusses the evidence or elements of an offense of which the appellant was acquitted is clearly misleading.
United States v. Lindsey, 23 USCMA 9, 48 CMR 265 (1974)
United States v. Graham, 46 CMR 947 (ACMR 1972)
 11. Prejudicially misleading for the review to discuss elements of more serious offense than that found.
United States v. Boyd, 23 USCMA 90, 48 CMR 598 (1974)—accused convicted of assault whereby grievous bodily harm was intentionally inflicted yet the review advised that he was convicted of assault with intent to commit murder.
United States v. Williams, 23 USCMA 342, 49 CMR 746 (1975)—accused charged with assault with intent to commit murder, pled guilty to assault with a means likely to produce grievous bodily harm. Review merely noted plea as "G/with exceptions."
 12. Failure of the review to cover such defenses and to provide guidance as to their resolution renders the review incomplete.
United States v. Smith, 23 USCMA 98, 48 CMR 659 (1974)—failure to discuss self defense.
United States v. Burston, 23 USCMA 478, 50 CMR 497 (1975)—failed to cover entrapment issue.
United States v. Childs, 43 CMR 514 (ACMR 1970)—self defense.
United States v. Webb, 46 CMR 1083 (1972)—review erroneously advised that mistake of fact was not a defense to uttering checks with intent to defraud, sets forth a erroneous standard of law.
 - United States v. Robinson*, 47 CMR 159 (ACMR 1973)—failure to discuss and to provide guidelines re insanity and self defense.
United States v. Gaines, 49 CMR 699 (ACMR 1974)—failure to discuss defense of innocent possession which has direct bearing on element that possession of heroin must be conscious and knowing.
 13. Prejudicial error for review to delete discussion of motions relating to search and seizure, speedy trial, admissibility of oral statements.
United States v. Nelson, 23 USCMA 258, 49 CMR 433 (1975)—failure to discuss search and seizure motion may be prejudicial.
United States v. Stevens, 46 CMR 907 (ACMR 1972)—failure to discuss search and seizure motion not prejudicial since it was not a key issue.
United States v. Huddleston, 50 CMR 199 (ACMR 1975)—failure to discuss speedy trial motion may be prejudicial.
 14. Character evidence admitted prior to findings tend to show a "probability of innocence." Paragraph 138(2), MCM
United States v. Jewell, CM 430817 (ACMR 25 October 1974)—error to advice that character evidence was merely extenuation and mitigation and that no evidence was offered on the merits where defense introduced character evidence prior to findings.
 15. Failure to include in the review information bearing upon the credibility of a key government witness deprives the accused an independent determination on the issue of credibility.
United States v. Nelson, 23 USCMA 258, 49 CMR 433 (1975)—failure to advise that witness testified pursuant to a grant of immunity.
United States v. Maisonet, CM 431593 (ACMR 8 April 1975)—failure to advise that two prosecution witnesses received Chapter 10 discharges the day after they testified. This information had a bearing on their credibility.
 16. Error for the review to suggest that the convening authority can not disagree with the court on the credibility of the accused or witnesses.
United States v. Grice, 8 USCMA 166, 23 CMR 390 (1957)
United States v. Fields, 9 USCMA 70, 25 CMR 332 (1958)
United States v. Boland, 49 CMR 795 (ACMR 1975)—convening authority properly advised as to age of victims.
 17. Convening authority should be aware that he must be satisfied of guilt beyond a reasonable doubt.
United States v. Jenkins, 8 USCMA 274, 24 CMR 84 (1957)—used standard of whether there was some evidence to support findings.
United States v. Fields, 9 USCMA 70, 25 CMR 332 (1958)
But see United States v. Owens, 15 USCMA 591, 36 CMR 89 (1966)
United States v. Wright, 49 CMR 828 (ACMR 1975)

18. The staff judge advocate must give reasons for his opinions as to the merits of contested issues and the sufficiency of the evidence.
United States v. Bennie, 10 USCMA 159, 27 CMR 233 (1959)
United States v. Hooper, 11 USCMA 128, 28 CMR 352 (1960)
United States v. Cruse, 21 USCMA 286, 45 CMR 60 (1972)
United States v. Smith, 23 USCMA 98, 48 CMR 659 (1974)
19. There must be evidence of record supporting the staff judge advocate's opinion.
United States v. Iturralde—Aponte, 47 CMR 759 (ACMR 1973)—SJA opined that evidence sufficient since accused was aggressor and therefore did not act in self defense. In fact, evidence showed the victim was the aggressor.
20. Prejudicial error for review to misadvice as to the nature of the plea.
United States v. Parks, 17 USCMA 87, 37 CMR 351 (1967)
United States v. McIlveen, 23 USCMA 357, 49 CMR 761 (1975)—review advised that accused's provident plea of guilty established his guilt of an offense, when in fact accused had pled not guilty.
United States v. Garcia, 23 USCMA 479, 50 CMR 498 (1975)
21. Review should note if the judge has difficulty accepting a guilty plea
United States v. Hill, 44 CMR 478 (ACMR 1971)
22. The convening authority must be correctly advised as to the maximum punishment.
United States v. Knoche, 46 CMR 458 (ACMR 1972)
United States v. Bruce, 46 CMR 968 (ACMR 1972)
United States v. DuPuis, 48 CMR 49 (ACMR 1973)
23. If the military judge rules the charges multiplicitous the review must advise the convening authority of this restriction on his discretion in determining an appropriate sentence.
United States v. Love, 46 CMR 741 (ACMR 1972)
24. Since the accused's best chance for reduction of the adjudged sentence is at the convening authority level, information favorable to the accused and known to the staff judge advocate should be included in the review.
United States v. Stevenson, 21 USCMA 426, 45 CMR 200 (1972)—in a disrespect case, error for the review not to advise that the officer involved was removed from his command shortly after the incident.
United States v. Roeder, 22 USCMA 312, 46 CMR 312 (1973)—review stated that accused testified he assaulted victim after victim made "bad remarks" about the accused's wife. This was not sufficient where the accused on extenuation and mitigation specified the exact nature of those remarks which were highly inflammatory.
- United States v. Edwards*, 23 USCMA 202, 45 CMR 955 (1974)
United States v. Wurm, 50 CMR 352 (ACMR 1975)—accused charged with transfer of heroin. Pled guilty. Failure of review to discuss facts and the statement of accused's attorney in extenuation left the incorrect impression that the accused was a dealer.
25. If the review suggests that the accused did not want to be retained in the Army, check to be sure that is his true intent.
United States v. Pinto, 47 CMR 460 (ACMR 1973)
United States v. Grant, 49 CMR 779 (ACMR 1975)—error for review to refer to excess leave request as indicative of lack of desire to remain in the service.
26. Failure to append and discuss letters and petitions from the accused in error.
United States v. Oliver, 42 CMR 906 (ACMR 1970)
United States v. Bellamy, 47 CMR 321 (ACMR 1973)
27. It is error for the review to advise the convening authority that he can consider evidence ruled inadmissible at trial.
United States v. Turner, 21 USCMA 356, 45 CMR 130 (1972)—inadmissible Article 15.
United States v. Grublak, 47 CMR 371 (ACMR 1973)
United States v. Naringi, SPCM 9391 (ACMR 18 March 1972)—review mentions inadmissible court motions conviction
28. It is error for the review to discuss derogatory evidence available at trial but which was not offered because it was inadmissible or otherwise.
United States v. Schaffer, 46 CMR 701 (ACMR 1972)—review referred to evidence seized in an illegal search.
United States v. Parker, 46 CMR 737 (ACMR 1972)
29. a) Error to include reference to prior juvenile or civilian arrests.
United States v. Stam, 50 CMR 91 (ACMR 1975)
 b) Accused must be afforded opportunity to rebut evidence of juvenile or civilian convictions *United States v. Stam*, 50 CMR 91 (ACMR 1975)
But see J. Ferguson's dissent in United States v. Luzzi, 18 USCMA 221, 32 CMR 221 at 22 (1969)
United States v. Holliman, 6 CMR 734 (ACMR 1972)
30. When the review includes reference to post-trial matters that can reasonably influence the reviewing authority to treat the accused less leniently than he might otherwise, the accused is entitled to rebut.
United States v. Morris, 9 USCMA 368, 26 CMR 148 (1958)
United States v. Littleton, 23 USCMA 279, 49 CMR 454 (1975)
United States v. Goode, 23 USCMA 367, 50 CMR 1 (1975)
United States v. Jonas, 50 CMR 399 (ACMR 1975)—accused convicted of possession of marihuana. Review appended as clemency matter a report by drug counselor that appellant's use of marihuana had declined since trial.

31. Post-trial review.
United States v. Brassel, 47 CMR 305 (ACMR 1973) Post trial interviewer remarked "Neither accused appears to appreciate the significance of the offense for which they pleaded guilty."
United States v. Mullaney, 44 CMR 534 (ACMR 1971)—review stated that accused appeared to be high during the interview.
32. The review must contain any recommendation by a person whose recommendation is likely to be weighed by the convening authority.
United States v. Boatner, 20 USCMA 376, 43 CMR 216 (1971)—immediate commander.
United States v. Parker, 22 USCMA 358, 47 CMR 10 (1973)—unit commander's recommendation against elimination.
United States v. Blake, 23 USCMA 362, 49 CMR 821 (1975)—military judge's recommendation for suspension of BCD.
United States v. Cain, 23 USCMA 363, 49 CMR 822 (1975)—court members recommended clemency.
United States v. Oliver, 42 CMR 906 (ACMR 1970)—failure to note trial counsel's recommendation for clemency.
United States v. Acosta, 46 CMR 583 (ACMR 1972)—battalion commander (This case contains an extensive list and summary of similar cases).
United States v. Tucker, 49 CMR 174 (ACMR 1974)—unit commander's recommendation for trial by non-BCD special court.
33. The accused is entitled to individualized sentence consideration.
United States v. Howard, 23 USCMA 187, 48 CMR 939 (1974)
United States v. Lacey, 23 USCMA 334, 49 CMR 738 (1975)
United States v. Kimble, CM 433192 (ACMR 25 August 1975)—error for review to state "The U.S. Army was not able to prevent this crime from happening but we can show others who may be so inclined that crime does not pay when they are caught."
34. Approved sentence must conform to the pretrial agreement.
United States v. Cox, 22 USCMA 69, 46 CMR 69 (1972)
United States v. Goode, 23 USCMA 367, 50 CMR 1 (1975)—any departure must be discussed in the review and the accused must be afforded the opportunity to rebut.
- Miscellaneous*
35. Even the barest appearance at racial bias must be eliminated from the review.
United States v. Silas, 23 USCMA 371, 50 CMR 5 (1975)—review speculated that witnesses' testimony was motivated by their racial identification with the accused.
36. The staff judge advocate has the responsibility of discussing the legal effect of any error or irregularity in the proceedings. Paragraph 85b, *MCM*

JAGC Personnel Section

From: PP&TO, OTJAG

1. ORDERS REQUESTED AS INDICATED

| Name | From | To |
|----------------------------|------------------------------------|---|
| LIEUTENANT COLONELS | | |
| BALDREE, Charles | USA LEG SVC AGY, EUROPE | USA LEG SVC AGY, Falls Church, VA W/sta Nurnberg, GERMANY |
| WHITE, Charles | Stu Det, AFSC, Norfolk, VA | S&F TJAGSA, Charlottesville, VA |
| MAJORS | | |
| BEANS, Harry C. | USA SUPPORT CMD HI APO SF 96558 | 25th Inf Div, APO SF 96225 |
| McHARDY, John A. | USA LEG SVC AGY, EUROPE | USA LEG SVC AGY, Falls Church, VA W/sta Mannheim, GERMANY |
| SUAREZ, Philip | 25th Inf Div, APO SF 96225 | USA SPT CMD HA, APO SF 96558 |
| CAPTAINS | | |
| CECIL, Larry G. | 9th Inf Div, Ft. Lewis, WA | USA LEG SVC AGY, Falls Church, VA W/sta Ft. Lewis, WA |

| NAME | FROM CAPTAINS Cont'd | TO |
|---------------------|--|---|
| CHAMPLAIN, ROBERT | 2d Inf Div, APO SF 96224 | EUROPE |
| HAGGARD, Albert | KOREA | USA Health Svc Cmd, Ft. Sam Houston, TX |
| HOLMES, David B. | USAG, Ft. Meade, MD | OTJAG, WASH DC |
| GARRETSON, Peter | 1st Inf Div, Ft. Riley, KS | USA LEG SVC AGY, Falls Church, VA W/sta Ft. Riley, KS |
| GRAVES, Joseph | USA Health Svc Cmd, Ft. Sam Houston, TX | OTJAG, WASH DC |
| HAMPTON, Thurman | USAG, Ft. Bragg, NC | USA LEG SVC AGY, Falls Church, VA W/sta Ft. Bragg, NC |
| JABLONSKI, Robert | USA Armor Cen, Ft. Knox, KY | USA LEG SVC AGY, Falls Church, VA W/sta Ft. Knox, KY |
| JAEKEL, William | USA Signal Cen, Ft. Gordon, GA | USA LEG SVC AGY, Falls Church, VA W/sta Ft. Gordon, GA |
| KARLSON, Henry | HQ CMD USASC, Ft. Gordon, GA | 101st Abn Div. Ft. Campbell, KY |
| McCARTHY, Daniel | 7th Inf Div, Ft. Ord, CA | USA LEG SVC AGY, Falls Church, VA W/sta Ft. Ord, CA |
| NORRIS, David E. | KOREA | USA LEG SVC AGY, Falls Church, VA W/sta Seoul, KOREA |
| PIETSCH, Coral | KOREA | USA SPT CMD, HI, APO SF 96558 |
| PIETSCH, James | KOREA | 25th Inf Div, APO SF 96225 |
| SCHNEIDER, Arthur | USAG, Ft. Meade, MD | USA LEG SVC AGY, Falls Church, VA W/sta Ft. Meade, MD |
| SCHWABE, Charles | 18th Abn Corps, Ft. Bragg, NC | OTJAG, WASH DC |
| STEIN, Richard | USATC Inf, Ft. Dix, NJ | USA LEG SVC AGY, Falls Church, VA W/sta Ft. Dix, NJ |
| THIELE, Alan R. | USA Field Artillery, Ft. Sill, OK | USA LEG SVC AGY, Falls Church, VA W/sta Ft. Sill, OK |
| TRUDO, Martha J. | USAG, Ft. Carson, CO | KOREA |
| WAGNER, Bruce F. | 101st Abn Div, Ft. Campbell, KY | USA LEG SVC AGY, Falls Church, VA W/sta Ft. Campbell, KY |
| ZIMMERMAN, John A. | 101st Abn Div, Ft. Campbell, KY | 7th Inf Div, Ft. Ord, CA |
| ZIMMERMANN, John C. | III Corps, Ft. Hood, TX | USA LEG SVC AGY, Falls Church, VA W/sta Ft. Hood, TX |

2. Armed Forces Institute of Pathology. There are three openings for JAGC officers for the Legal Medicine Program at the Armed Forces Institute of Pathology, Walter Reed Army Medical Center, Washington, D.C., for classes commencing in August 1976.

The AFIP Program is designed to train lawyers and law enforcement officers in the Forensic Sciences. The Legal Medicine portion of the training includes courses in physiology,

anatomy and forensic pathology, as well as the study of the relationship between the practice of medicine and the law. The Criminalistics portion of the program concentrates on the physical and chemical examination of evidence in the crime laboratory, to include fingerprints, hair and soil analysis, firearms examination, analysis of questioned documents, forensic serology, and many other areas of scientific and legal importance. The course allows the individual wide latitude in pursuing areas in which he has particular inter-

ests, so that one student may concentrate on medical malpractice cases while another devotes most of his time to the crime lab.

Students are assigned to the AFIP for a period of one year; they simultaneously pursue a Master's Degree at George Washington University. At the completion of the year students are awarded certificates from the AFIP, and a Master's of Forensic Sciences or Master's of Science in Forensic Sciences from George Washington University.

Following completion of the training, a two-year active duty commitment is incurred. Assignments for this minimum two-year period are normally to the U.S. Army Claims Service, Ft. Meade, Maryland, or Torts Branch, Litigation Division, OTJAG. Interested personnel should correspond with Major Kennett, PP&TO, by 15 April 1976.

3. Reduction in Active Duty Obligation for Excess Leave Officers. The active duty obligation for graduates of The Judge Advocate General's Excess Leave program has been reduced to four years for ROTC scholarship officers and to three years for all other graduates. The obligation begins on the date the officer enters the Basic Class, TJAGSA, or is admitted to the practice of law following graduation from law school, whichever occurs first. For officers who entered the Advanced Course, TJAGSA, immediately after graduation from law school, the three or four year active duty obligation began on the date the officer entered the Advanced Course or was admitted to the practice of law following graduation from law school, whichever occurred first. The active duty obligation for graduates of the funded legal education program (AR 351-22) remains at six years.

4. Armed Forces Week. The Department of Defense will conduct its major observance of the nation's bicentennial beginning Saturday, 8 May 1976, and ending Saturday, 15 May 1976. The Armed Forces Week (AFW) concept calls for a highly visible observance conducted predominantly in the civilian domain. The theme is "Honor America." Maximum active participation by all DOD components is required. Extension of hospitality to the general public via open house or similar activities on military installations and

ships is considered only a part of the overall program. During AFW all active duty military personnel will wear their Class A uniform with authorized ribbon and medals wherever appropriate on and off duty. Military personnel are expected to make a special effort to observe meticulously military customs and traditions. Officials are encouraged to accept speaking engagements and other opportunities to demonstrate the armed forces' tribute to the nation. This could include explaining and demonstrating military customs and traditions before interested groups. Participation in patriotic ceremonies, military exhibits and displays are encouraged. Activities which emphasize violence such as hand-to-hand combat demonstrations are not considered appropriate. Military hosted social events at Officers, NCO and Enlisted Clubs and other appropriate facilities are recommended. Coordination with local civilian committees is encouraged, as is media coverage of AFW activities.

5. 25th Advanced Course. A board of officers convened on 12 January 1976 to select 50 students for the 25th Judge Advocate Officer Advanced Course commencing in August 1976. All captains with the date of rank of 1 September 1972 or earlier and all majors with the date of rank of 1 January 1974 or later will be considered. However, officers who have attended an advanced course of another branch, who have attended civilian schooling for an LL.M. on a full-time basis at government expense, who have substantially completed the Judge Advocate Officer Advanced Correspondence Course or Judge Advocate Officer Advanced Course (Nonresident/Resident) or who have not served at least one year in the "field" as a JAG officer as of 1 September 1976 are ineligible. Branch transferees, excess leave and FLEP officers who do not fit within the above "window" and who are otherwise eligible will be considered at least twice. All officers now eligible will have at least two opportunities for selection. Officers not selected this time for the resident Advanced Course are encouraged to complete one of the nonresident Advanced Courses. Application for the Advanced Course need not be made. Officers selected should consult paragraph 21, AR 350-100.

Current Materials of Interest

Articles.

Members of the Minnesota legal community now have an additional law review, *The WILLIAM MITCHELL LAW REVIEW*, covering Minnesota law. Publication began in late 1975 with Volume 1 Number 1 Dated 1974. Contact: William Mitchell Law Review, William Mitchell College of Law, Room 106, 2100 Summit Ave., St. Paul, MN 55105.

The American Bar Foundation will begin publication of its individual monographs and other research projects in the *ABF RESEARCH JOURNAL*. Contact: American Bar Foundation, 1155 E 60th St., Chicago, IL 60637.

Captain Edward J. Imwinkelried, JAGC, USAR, currently Associate Professor of Law at the University of San Diego School of Law, San Diego, CA 92110, has co-authored two law review articles. The *TEXAS LAW REVIEW* will publish "An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community." The *NOTRE DAME LAWYER* will publish "Constitutional Rights and Military Necessity: Some Reflections on the 'Society Apart.'"

Other Articles of Interest Are:

Comment, "Confidential Information Under the *Code of Professional Responsibility*—Canon 4," 79 *DICK. L. REV.* 650 (Summer 1975).

Wurfel, "Jet Age Domicile: The Semi-Demise of Durational Residence Requirements," 11 *WAKE FOREST L. REV.* 349 (October 1975). (Colonel Seymour W. Wurfel, USA Retired, is a Professor of Law at the University of North Carolina.)

Paust, "Terrorism and the International Law of War," 14 *MIL. L. & L. WAR REV.* 13 (1975). This article is reprinted from 64 *MIL. L. REV.* 1 (1973). (Captain Paust is a mobilization designee of The Judge Advocate General's School, and a Professor of Law at the University of Houston College of Law.)

McGowan, "Training in the Geneva and Hague Conventions: A Dead Issue?" 14 *MIL. L. & L. WAR REV.* 51 (1975). (Major James J. McGowan, Jr.,

JAGC, currently assigned to HQ, JT US Military Advisory Group, Thailand.)

Fontenot, "Development of the Staff Legal Officer's Responsibility Under the Law of War," 14 *MIL. L. & L. WAR REV.* 69 (1975). (Captain Russell J. Fontenot, JAGC, currently assigned to the staff of the US Army ADMINCEN, Ft. Benjamin Harrison.)

Case Comment, "Freedom of Information Act: The Expansion of Exemption Six," 27 *U. FLA. L. REV.* 848 (Spring 1975).

"The United Nations Standard Minimum Rules for the Treatment of Prisoners," 11 *CRIM. L. BULL.* 637 (September—October 1975).

AR Revisions.

DAJA-CL has announced an interim change to Chapter 14, AR 27-10, 26 November 1968, effective 1 January 1976. The title of Chapter 14 is changed to "Issuance of Search Warrants by Military Judges and Military Magistrates." The chapter establishes the authority and procedures for the issuance of search warrants by military judges assigned to the United States Army Judiciary and military magistrates assigned to the United States Army Legal Services Agency. The authority of military judges and military magistrates to issue search warrants does not abrogate the authority of commanders to authorize searches under paragraph 152, MCM, 1959 (Rev.). Any warrant issued should be upon presentment of an affidavit establishing probable cause (para 152, MCM, 1969 (Rev.)), shall identify the evidence sought, and shall name or describe the person or property to be searched. The person who shall make the search will be directed to notify a commanding officer of the individual or the officer responsible for the premises to be searched, or their responsible representatives, unless the military judge or magistrate, in his discretion, concludes that such notice would impede the orderly execution of the warrant. The finding of probable cause shall be based upon substantial evidence which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible. The full text of the

interim changes will be included in a subsequent printing change to AR 27-10.

AR 350-30, *Code of Conduct Training*, and AR 350-225, *Survival, Evasion, Resistance, and Escape (SERE) Training*, have been revised effective 1 October 1975 as a result of the evaluation of the experience of recent U.S. Army PW returnees, initiated by the Chief of Staff, U.S. Army. Army PW returnees considered the Code of Conduct sound and useful but characterized their previous Code of Conduct training as insufficient, uninteresting, unrealistic and often ir-

relevant. The evaluation also indicated inadequacies in training policy guidance with respect to the Code of Conduct leading on some occasions to conflicting or erroneous interpretations of the Code. The revised AR's clarify the interpretation of the Code of Conduct, and describe the relationship between the Code, the Geneva Conventions and the Uniform Code of Military Justice (UCMJ). In particular, AR 350-30 contains a detailed interpretation of those articles of the Code which recent experience has indicated require additional explanation.

ERRATA

A regrettable typesetter's error in Robert Gerwig's article in the December issue of *The Army Lawyer*, "Article 138 Revisited," merits immediate attention. The legislative proposal on the bottom of the first column on page 22 should read:

"S. 938. Art. 138. Complaints of wrongs.

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the [officer exercising general

court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction]* *Judge Advocate General of the armed force of which the officer against whom it is made is a member.*

Our publication apologizes to Mr. Gerwig and to our readers for this printer's miscue. We hope that the relatively speedy distribution of our publications will more than offset the printer's occasional deviations from our original manuscripts.

* The words in brackets were lined over in the original bill.

By Order of the Secretary of the Army:

Official:

PAUL T. SMITH

Major General, United States Army
The Adjutant General

FRED WEYAND

General, United States Army
Chief of Staff

